No. 95-924

(3)

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1995

L.P. PATTERSON, et al.,

Petitioners,

v.

NATIONSBANK OF TEXAS, N.A., TIMOTHY P. HARTMAN, AND ROBERT B. LANE,

Respondents.

and

L.P. PATTERSON, et al.,

Petitioners,

v.

BANK ONE, TEXAS, N.A., HARVEY MITCHELL AND RONALD STEINHART,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF OF NATIONSBANK OF TEXAS, N.A., TIMOTHY P. HARTMAN, AND ROBERT B. LANE IN OPPOSITION

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QUESTIONS PRESENTED

Does 12 U.S.C. § 484 prohibit the Texas House of Representatives' Committee on Agriculture and Livestock from conducting an extensive review and inspection of the books and records of a national bank?

The Comptroller of the Currency has construed 12 U.S.C. § 484 to prohibit the extensive review and inspection sought by the Committee. Is the OCC's construction permissible and therefore entitled to deference by the courts?

LIST OF PARTIES

Pursuant to Rule 29.6, the following names are added to the list of parties appearing at pages (ii) and (iii) of the Petition for Writ of Certiorari:

NationsBank Corporation
NationsBank Texas Corporation
NationsBank Texas Bancorporation

These corporations are parent companies of Respondent NationsBank of Texas, N.A., which has no nonwholly owned subsidiaries.

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OPINIONS BELOW

The judgment of the Court of Appeals and the Memorandum Opinion of the District Court, both unpublished, are reproduced at pages A-1 through A-7 of the Appendix to the Petition for Writ of Certiorari. The judgment of the District Court as to NationsBank of Texas, N.A., Timothy P. Hartman, and Robert B. Lane is reproduced at page A-1 of the Appendix to this brief.

STATUTES AND REGULATIONS INVOLVED

This case involves 12 U.S.C. § 484 and 12 C.F.R. § 7.6025 (1993), which are reproduced at pages A-20 and A-22 of the Appendix to the Petition for Writ of Certiorari, and an OCC Opinion Letter dated June 4, 1993, which is reproduced at page A-3 of the Appendix to this brief.

STATEMENT OF THE CASE

In May 1993, a meeting of the Texas House of Representatives' Committee on Agriculture and Livestock was convened by the Committee's Chairman, Representative L.P. Patterson. [R(2) p. 83] At this meeting, which lasted one minute, Representative Patterson successfully moved the Committee to authorize the issuance of legislative subpoenas directed to NationsBank, its Chairman, and its President (collectively "NationsBank"). [R(2) p. 83] The

express purpose of the subpoenas was to require NationsBank to provide information and documents relating to its "lending practices in Texas." [R(2) p. 83]

Shortly after the Committee's meeting, two subpoenas were served upon NationsBank. [R(2) p. 90] They purported to require NationsBank to produce for the Committee's inspection an enormous amount of information pertaining to virtually every aspect of NationsBank's lending practices and procedures. For example, the subpoenas would have required NationsBank to produce information concerning each of the more than 300,000 loans that NationsBank had outstanding in Texas, to provide NationsBank's proprietary credit policy and loan procedures manuals for inspection by the Committee, and to gather and produce loan files for tens of thousands of loans. [R(2) pp. 105, 90] The subpoenas also purported to require the two highest-ranking NationsBank officers to appear before the Committee and give testimony concerning NationsBank's lending practices. [R(2) pp. 90 &92] Compliance with the subpoenas would have required more than 70,000 hours of employee time and cost millions of dollars. [R(2) pp. 105-06]

The Petition for Writ of Certiorari attempts to leave the impression that the subpoenas served upon NationsBank were the result of some sort of legitimate legislative concern. *See* Petition pp. 3-4. This is not an accurate portrayal of the situation. The Committee was created to deal with matters such as agriculture and livestock, not bank lending practices. [R(2) p. 129] It is also apparent that the subpoenas were not really the work of the Committee as a whole, but rather just of Representative Patterson. The subpoenas were issued on his motion during

a one minute meeting, not after deliberation and discussion among the Committee. [R(2) p. 83] Not one Committee member or legislator other than Representative Patterson has submitted an affidavit in support of the subpoenas or, as far as the record reflects, participated at all in this litigation.

In truth, the subpoenas were part of what can only be described as a one-man campaign against NationsBank. Since 1988, Representative Patterson has called for two investigations of NationsBank and has introduced five unsuccessful bills that would have imposed special taxes and reporting requirements upon NationsBank. [R(2) pp. 26-42] Representative Patterson has also issued a number of public statements concerning NationsBank:

> "With all of the financial institution takeovers by out-of-state corporations such as NCNB, one half of our depository funds are controlled by these large corporations."
>
> "The activities of holding companies should be curbed to prevent inordinate money in flight. If the federal government won't do it, states will."
>
> "NCNB is flat raping the state"
>
> "NCNB carpetbags Texas"
>
> "We can and must do something . . . including passing bank reform measures. We don't have to let these things continue, and we don't have to rely on uncaring Federal regulators, who were and are a large part of the problem."

[R(2) pp. 63, 71, 81, 45, 46]

It is wrong for the Petition, as part of an effort to obtain review by this Court, to pretend the subpoenas are

something they are not. They are the work of a single individual who desires to conduct an inquisition into the lending activities of a national bank, they seek to accomplish by subpoena what that individual could not accomplish by legislation, they are drafted to create the greatest possible burden and expense for NationsBank, and they are discriminatory, having been served upon only two of the more than 1,000 banks in Texas. [R(2) p. 90]

Upon receiving the subpoenas, NationsBank brought suit seeking a declaratory judgment that the subpoenas were prohibited and preempted by 12 U.S.C. § 484, which provides as follows:

> (a) No national bank shall be subject to any visitorial powers except as authorized by Federal law, vested in the courts of justice or such as shall be, or have been exercised or directed by Congress or by either House thereof or by any committee of Congress or of either House duly authorized.
>
> (b) Notwithstanding subsection (a) of this section, lawfully authorized State auditors and examiners may, at reasonable times and upon reasonable notice to a bank, review its records solely to ensure compliance with applicable State unclaimed property or escheat laws upon reasonable cause to believe that the bank has failed to comply with such laws.

12 U.S.C. § 484. Because the inspection of bank books and records is a type of "visitorial power" prohibited by subsection (a), and in light of the limited state review of national bank records permitted by subsection (b), NationsBank urged that the plain language of Section 484 prohibited the subpoenas. [R(2) pp. 14-16] In addition,

NationsBank urged the District Court to give deference to an interpretive ruling from the Office of the Comptroller of the Currency (the "OCC"), and to an OCC opinion letter, both of which construed Section 484 to prohibit the subpoenas. [R(2) pp. 16-17]

The parties agreed that the validity of the subpoenas was a question appropriate for disposition as a matter of law and that the matter should be presented to the District Court by way of cross-motions for summary judgment. [R(1) pp. 23-25] The District Court granted NationsBank's motion for summary judgment, denied the Committee's cross-motion, and entered judgment in favor of NationsBank, declaring the subpoenas void and enjoining their enforcement. [R(1) pp. 239-40] The Fifth Circuit summarily affirmed. *See* Appendix to Petition p. A-2.

REASONS THE PETITION SHOULD BE DENIED

In the 131-year history of Section 484 and its predecessor statutes, we believe this case is the only time that a state legislator and a national bank have litigated a dispute under Section 484. Given the unusual circumstances giving rise to the subpoenas at issue, this case is almost sure to be the last time as well. It certainly does not present any of the "special and important reasons" necessary to justify this Court's review.

(1) The lower courts' decisions are not in conflict with other decisions and do not present an "important question"

The decisions reached by the lower courts and the legal reasoning behind them do not present any conflict with a decision of this Court or any other. In fact, the District Court's deference to the OCC's construction of Section 484 was mandated by this Court's precedents regarding the OCC's construction of other national banking laws. *See NationsBank of North Carolina, N.A. v. Variable Annuity Life Ins. Co.*, 115 S. Ct. 810, 813-14 (1995) (OCC's reasonable construction of banking laws is entitled to "controlling weight"); *Clarke v. Securities Indus. Ass'n*, 479 U.S. 388, 403-04 (1987) (reasonable construction of banking laws by OCC is entitled to great weight).

This case, being unique, also does not present an issue of importance to anyone other than Petitioners and Respondents. The Fifth Circuit concluded that its summary affirmance of the District Court's judgment "merely decide[d] [a] particular case on the basis of well-settled principles of law." Appendix to Petition p. A-2 n. One of those principles – the weight to be given the OCC's construction of national banking laws – has just recently been reaffirmed by the Supreme Court. *See NationsBank of North Carolina, N.A. v. Variable Annuity Life Ins. Co.*, 115 S. Ct. 810, 813-14 (1995). The Petition is merely dissatisfied with the unanimous view of the OCC, the District Court, and the Fifth Circuit concerning Representative Patterson's subpoenas, and presents no compelling reasons for this Court's review.

(2) The lower courts' decisions would be correct regardless of the outcome of the questions presented by Petitioners

Both the issues presented by Petitioners concern the reasonableness of the OCC's interpretation of Section 484 and whether the federal courts should give weight to that interpretation. *See* Petition p. i. While the lower courts' decisions on those matters were entirely correct, the issues need not be reached, because the plain language of Section 484 alone prohibits the inspection sought by the Committee and would sustain the lower courts' decisions.

In the Court of Appeals, the Committee expressly acknowledged that "[w]ithout question, 12 U.S.C. § 484 is intended to preempt state visitorial powers over national banks." Appellants' Opening Brief p. 25. And the brief implicitly acknowledged that inspection of a bank's books and records is a species of "visitorial power" within the meaning of Section 484. *See* Appellants' Opening Brief pp. 11-12 (speaking of the "visitorial power to examine corporate books and records" and "visitorial statutes which give the state access to corporate books and records"); *see also National State Bank v. Long*, 630 F.2d 981, 989 (3rd Cir. 1980) (visitorial powers "generally . . . do encompass examination of the bank's books and records"). But the Petition suggests that the inspection of bank books and records is not "visitorial" when attempted by a legislative committee, as opposed to other state officials, because neither a legislature nor a legislative committee has the "power to enforce laws." Petition p. 13.

The Committee's artificial differentiation of a state legislature from the rest of state government finds no support in the language of Section 484. In subsection (a), Congress expressly excepted from the prohibition of Section 484 the exercise of visitorial powers "by Congress or by either House thereof or by any committee of Congress or of either House duly authorized." Congress would not have needed this exception if the actions of a legislature and its committees could not be visitorial. That Congress created the exception means that Congress must have understood the prohibited "visitorial powers" to include inspections by purely legislative bodies.

Just as telling is subsection (b), which provides that "notwithstanding subsection (a)," state authorities have the right to "review [a bank's] records *solely* to insure compliance with applicable state unclaimed property or escheat laws." 12 U.S.C. § 484(b) (emphasis added). It obviously would not have been necessary for Congress to allow "notwithstanding subsection (a)" the review of national bank records *solely* for escheat law purposes if subsection (a) did not already generally preclude the review of national bank records by state authorities.

The history of Section 484 likewise provides no support for the Committee's position. Prior to its amendment in 1982 to its current form, Section 484 provided only:

> No bank shall be subject to any visitorial powers other than such as are authorized by law, or vested in the courts of justice or such as shall be or shall have been exercised or directed by Congress, or by either House thereof or by any committee of Congress or of either House duly authorized.

12 U.S.C. § 484 (1876). The 1982 amendments did two significant things. First, the "except as authorized by law exception" was changed to "except as authorized by *Federal* law." 12 U.S.C. § 484(a) (emphasis added). Second, as we have discussed, the amendments added subsection (b) to describe the only circumstances under which state officials may review national bank records. Whether undertaken to clarify Section 484 or to broaden its protection against state inspections, the effect of the amendments is unmistakable: state officials may not review records of national banks except to ensure compliance with state escheat laws. Indeed, the only pertinent legislative history concerning the 1982 amendments clearly indicates Congress' intent with respect to subsection (b):

> The bill permits review of national bank records by state auditors and examiners. Such reviews of relevant documentation may be conducted *solely to determine compliance with applicable state unclaimed property or escheat laws* if such officials have reasonable cause to suspect that a bank has violated those laws.

S. Rep. No. 97-536, 97th Cong., 2d Sess. 29 (1982) (emphasis added).

There are no judicial decisions that even hint that a state legislative committee's attempt to conduct an extensive review and inspection of national bank records is not visitorial in nature and prohibited by Section 484. There are also no cases that support the Committee's illogical argument that what would be visitorial and prohibited if attempted by state examiners, agencies, or executive officers is not prohibited if attempted by a state legislature. It is just not possible that Section 484 was intended to

protect national banks from document reviews by certain state officials, but not from identical activities undertaken by state legislators. Regardless of the OCC's interpretation, and the questions presented by the Petition, the language of Section 484 alone confirms the correctness of the lower courts' decisions.

(3) The District Court was correct to defer to the Comptroller's construction of Section 484

The OCC's interpretive ruling concerning Section 484 provides:

> The exercise of visitorial powers over national banks is vested in the Comptroller of the Currency. *See* 12 U.S.C. § 484. Other officials, including state banking officials, have no authority to conduct examinations or to inspect or require the production of books or records of national banks, except for the limited purpose of ensuring compliance with applicable State unclaimed property and escheat laws. State authority to review the books and records of a national bank is limited to those circumstances in which there is reasonable cause to believe that the bank has failed to comply with such laws. . . .

12 C.F.R. § 7.6025(b) (1993). In an opinion letter, the OCC has also concluded that the very subpoenas at issue in this case violate Section 484:

> In sum, we do not believe that [NationsBank] is required to comply with the subpoenas in question. This attempted exercise of visitorial power by local officials is not "authorized by Federal law," conflicts with the express terms of 12

> U.S.C. § 484, as historically interpreted and particularly as amended in 1982, and is incompatible with the comprehensive scheme of federal supervision and examination of national banks administered by the OCC.

[R(2) p. 136]

The OCC is the federal agency responsible for the execution of all laws pertaining to national banks. 12 U.S.C. § 1. There is no question that the OCC's construction of Section 484, if a permissible one, must control:

> It is settled that courts should give great weight to any reasonable construction of a regulatory statute adopted by the agency charged with the enforcement of that statute. The Comptroller of the Currency is charged with the enforcement of banking laws to an extent that warrants the invocation of this principle with respect to his deliberative conclusions as to the meaning of these laws.
>
> Under the formulation now familiar, when we confront an expert administrator's statutory exposition, we inquire first whether the intent of Congress is clear as to the precise question at issue. If so, that is the end of the matter. But if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute. If the administrator's reading fills a gap or defines a term in a way that is reasonable in light of the legislature's revealed design, we give the administrator's judgment controlling weight.

NationsBank of North Carolina, N.A. v. Variable Annuity Life Ins. Co., 115 S. Ct. 810, 813-14 (1995) (internal citations and quotations omitted).

The OCC's construction of Section 484 is undoubtedly reasonable and permissible. It is consistent with the plain words of the statute, and also the "comprehensive scheme" constructed by Congress in which the supervision and examination of national banks is made the exclusive responsibility of the OCC. *See, e.g.*, 12 U.S.C. § 481 (giving the Comptroller the right to conduct "thorough examination[s] of all the affairs of [a national] bank"). Such a construction also comports with pertinent legislative history concerning the 1982 amendments to Section 484. *See* S. Rep. No. 97-536, 97th Cong., 2d Sess. 29 (1982) (explaining that the bill to amend Section 484 permits the review of national bank records by state examiners "*solely* to determine compliance with applicable . . . escheat laws") (emphasis added)).

Although the Petition challenges the reasonableness of the OCC's construction, it does so only by ignoring the plain language of Section 484, and then providing a string cite of cases that are said to define the term "visitorial power" to mean only "the power to enforce laws regulating the existence of the corporation, including the power to compel forfeiture of a corporation's charter." Petition pp. 13 and 14. This is a horrible mischaracterization of the cases cited, not one of which supports the Committee's

assertion.[1] In fact, the one Supreme Court case cited by the Committee seems to specifically refute the idea that legislative actions cannot by definition be visitorial:

> Visitation is defined . . . as . . . the act of examining into the affairs of a corporation.
>
> * * *
>
> In the United States, *the legislature is the visitor* of all corporations created by it.
>
> * * *
>
> Congress had in mind, in passing [predecessor to Section 484] that in other sections of the law it had made full and complete provision for investigation by the Comptroller of the Currency. . . . It was the intention that this statute should contain a full code of provisions upon the subject,

---

[1] For example, *Bowles v. Shawano Nat'l Bank*, 151 F.2d 749 (7th Cir. 1945), *cert. denied*, 327 U.S. 781 (1946); *NLRB v. Northern Trust Co.*, 148 F.2d 24 (7th Cir.), *cert. denied*, 326 U.S. 731 (1945); and *FTC v. Rockefeller*, 441 F. Supp. 234 (S.D.N.Y. 1977), *aff'd*, 591 F.2d 182 (2nd Cir. 1979), are said to hold that subpoenas issued by various federal agencies did not constitute an exercise of visitorial powers. Petition p. 14. These cases, however, hold no such thing. In each case, the subpoenas at issue were *assumed to constitute visitorial powers* that would ordinarily be prohibited by Section 484, but were held to fall within one or more of the express statutory exceptions, primarily the "except as authorized by law [now Federal law]" exception. *See Bowles*, 151 F.2d at 751; *Northern Trust*, 148 F.2d at 29; *Rockefeller*, 441 F. Supp. at 243. If anything, these cases support NationsBank's position by indicating that subpoenas requiring the production of bank records *are* visitorial in nature and can be enforced only if one of the express statutory exceptions to Section 484 applies. None of these cases, or any others, suggest that the term "visitorial power" should be defined in the manner proposed by the Petition.

> and that *no* state law or enactment should undertake to exercise the right of visitation on a national corporation.

Guthrie v. Harkness, 199 U.S. 148, 157-59 (1905) (emphases added, internal citations and quotations omitted).

The Committee's petition also fails to acknowledge the only case decided in the last 100 years that has addressed a situation in which *state* governmental officials sought production of national bank records for *non-escheat* purposes. In *National State Bank v. Long*, 630 F.2d 981 (3rd Cir. 1980), the Third Circuit specifically found that visitorial powers "generally . . . do encompass the examination of [a] bank's books and records," and then concluded that because "the exclusivity of the power to examine" the books and records of a national bank rests with the OCC, state officials were precluded by Section 484 from examining national bank books and records for purposes of a state anti-redlining statute. *Id.* at 988-89.

No court has ever found the OCC's construction to be unreasonable or impermissible, and the lower courts were entirely correct in giving effect to that construction.

(4) The "plain statement rule" invoked by the Petition is inapplicable to this case

The Petition suggests that the "plain statement rule" described in *Gregory v. Ashcroft*, 501 U.S. 452 (1991), precludes the OCC from interpreting Section 484 in the way that it has, and that the lower courts' decisions therefore are inconsistent with *Gregory*. *See* Petition pp. 17-23. This suggestion is incorrect and does not merit review by the Court.

The plain statement rule provides that if Congress intends to "alter the usual constitutional balance between the States and the Federal Government" by subjecting a fundamental "sovereign power" of the States to federal legislation pursuant to the Supremacy Clause, Congress must make its intent plain in the language of the statute. *Gregory*, 501 U.S. at 460-61. Thus, in *Gregory*, the Court declined to read the ADEA to preempt a state mandatory retirement age for judges in the absence of statutory language that plainly subjected those judges to the ADEA. *Id.* at 470. The plain statement rule was found applicable because "the authority of the people of the States to determine the qualifications of their most important government officials" is a power that "lies at the heart of a representative government" and is "reserved to the States under the Tenth Amendment and guaranteed them by" the Guarantee Clause of the Constitution. *Id.* at 463.

The plain statement rule has nothing to do with this case. First, as discussed above, the plain language of Section 484 does prohibit the subpoenas. But more fundamentally, the inspection of the books and records of a *national* bank obviously is not something that involves any matter of state sovereignty or seeks to alter the balance of power between States and the Federal Government. National banks are creatures of *federal* law and are subject to state law only to the extent that federal law permits:

> National banks are instrumentalities of the federal government, created for a public purpose, and as such necessarily subject to the paramount authority of the United States. It follows

> that an attempt by a state to define their duties or control the conduct of their affairs is absolutely void, wherever such attempted exercise of authority expressly conflicts with the laws of the United States, and either frustrates the purpose of the national legislation or impairs the efficiency of these agencies of the federal government to discharge the duties for the performance of which they were created. These principles are axiomatic, and are sanctioned by the repeated adjudications of this court.

Davis v. Elmira Savings Bank, 161 U.S. 275, 283 (1896). The states possess no fundamental sovereign power that entitles them to conduct inspections of national banks, which are subject first and foremost to the federal law upon which their existence depends. For the Petition to invoke the plain statement rule under the circumstances of this case is backwards – this case involves not federal interference with a state sovereign power, but rather state interference with a federal matter.

CONCLUSION

This case presents no issue worthy of the Court's attention, and the decisions of the lower courts were correct and in accord with the applicable precedents of this Court. The Petition for Writ of Certiorari therefore should be denied.

Respectfully submitted,

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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

NATIONSBANK OF TEXAS, N.A., TIMOTHY P. HARTMAN, AND ROBERT B. LANE, Plaintiffs,	§	NO. 3:93-CV-1107-G
v.	§	
L.P. PATTERSON, CHARLES FINNELL, RENATO CUELLAR, ALLEN HIGHTOWER, MARY DENNY JAMES, JERRY JOHNSON, BOB RABUCK, BOB TURNER, DAVID SWINFORD, ELTON BOMER, AND BERNARD ERICKSON, Defendants.	§	(Filed Sept. 27, 1994)

JUDGMENT

Plaintiffs' Motion for Summary Judgment having been granted by the Court for the reasons set forth in the Memorandum Order filed on September 9, 1994 in *Bank One, Texas, N.A. et al. v. Patterson, et al.*, Civil Action No. 3:93-CV-1081-G, it is

ORDERED and ADJUDGED:

(1) that the Legislative Subpoenas served upon plaintiffs by defendants are prohibited and preempted by federal law and therefore are invalid;

(2) that plaintiffs need not appear, testify, or produce documents or information in response to the Legislative Subpoenas or otherwise comply with the Legislative Subpoenas;

(3) that defendants and all persons acting on behalf of defendants are permanently enjoined from directly or indirectly enforcing or attempting to enforce the Legislative Subpoenas served upon plaintiffs; and

(4) that costs of court are taxed against defendants.

Signed Sept. 27, 1994.

/s/ A. Joe Fish
A. JOE FISH
United States
District Judge

[LOGO]

Comptroller of the Currency
Administrator of National Banks

Washington, D.C. 20219

June 4, 1993

Harry J. Grim
General Counsel
NationsBank of Texas, NA
901 Main Street
68th Floor
Dallas, Texas 75283-0142

Dear Mr. Grim:

This is in response to your recent communication asking for our opinion concerning certain subpoenas issued by the Agriculture Committee of the Texas House of Representatives. The subpoenas seek detailed information relating to the lending policies and practices of your Bank, to be found in the books and records and related materials of the Bank.

For the reasons given below, it is our firm conclusion that this represents an attempted exercise of visitorial powers by the state authorities which conflicts with and is therefore preempted by 12 U.S.C. 484, the federal statute which specifies and limits the circumstances wherein the books and records of national banks may be examined.

National banks are federal instrumentalities, created for a public purpose, and subject to paramount federal law. *See, e.g., First Nat. Bank v. Dickinson,* 396 U.S. 122 (1969); *Davis v. Elmira Savings Bank,* 161 U.S. 275 (1896). National

banks must generally comply with state laws but only to the extent that those laws do not conflict with federal law or regulation, frustrate the purposes for which national banks were created, or impair their efficiency in the discharge of their statutory duties. *Davis v. Elmira Savings Bank,* 161 U.S. 275 (1896); *Anderson Nat. Bank v. Luckett,* 321 U.S. 233 (1944). The conflict with federal law posed by the state subpoenas in the situation under discussion is clear and direct.

Ever since the passage of the National Bank Act in 1864, Congress has included an express statement narrowly restricting outside access to information contained in the internal files and reports of national banks. The limitation on visitorial powers is now contained in 12 U.S.C. 484, which provides:

> (a) No national bank shall be subject to any visitorial powers except as authorized by Federal law, vested in the courts of justice or such as shall be, or have been exercised or directed by Congress or by either House thereof or by any committee of Congress or of either House duly authorized.
>
> (b) Notwithstanding subsection (a) of this section, lawfully authorized State auditors and examiners may, at reasonable times and upon reasonable notice to a bank, review its records solely to ensure compliance with applicable State unclaimed property or escheat laws upon reasonable cause to believe that the bank has failed to comply with such laws.

Notice that the exercise of visitorial powers must be authorized by federal law.

The Office of the Comptroller of the Currency ("OCC") has issued Interpretive Ruling 7.6025(b), 12 C.F.R. 7.6025(b), which explains the visitorial powers limitation as follows:

> (b) *Visitorial powers.* The exercise of visitorial powers over national banks is vested in the Comptroller of the Currency. See 12 U.S.C. 484. Other officials, including state banking officials, have no authority to conduct examinations or to inspect or require the production of books or records of national banks, except for the limited purpose of ensuring compliance with applicable State unclaimed property and escheat laws. State authority to review the books and records of a national bank is limited to those circumstances in which there is reasonable cause to believe that the bank has failed to comply with such laws. Federal law provides special procedures for verifying payroll records for unemployment compensation purposes (26 U.S.C. 3305(c)), for enforcing the Fair Labor Standards Act (29 U.S.C. 211), and for ascertaining the correctness of Federal tax returns (26 U.S.C. 7602).

The concept of visitation embodied in 12 U.S.C. 484 has been described as an act of a superior examining into a corporation's conduct of its business, an action of "inspection; superintendence; direction; regulation." *First Nat. Bank of Youngstown v. Hughes*, 6 F. 737, 740 (C.C. Ohio 1881), appeal dismissed 106 U.S. 523. *See also Peoples Bank v. Williams*, 449 F. Supp. 254 (W.D. Va. 1978) (Visitorial powers involves the exercise of the right of inspection, superintendence, direction, or regulation over a bank's affairs); *National State Bank v. Long*, 630 F.2d 981 (3d Cir.

1980) (visitorial powers include the inspection or review of a bank's books and records).

The clearest expression concerning the exclusive nature of the visitorial powers conferred on the OCC appears in *Guthrie v. Harkness*, 199 U.S. 148 (1905):

> The right of visitation being a public right, existing in the state for the purpose of examining into the conduct of the corporation with a view to keeping it within its legal powers, Congress had in mind, in passing this section, that in other sections of the law it had made full and complete provision for investigation by the Comptroller of the Currency and examiners appointed by him. . . . It was the intention that this statute should contain a full code of provisions upon the subject, and that no state law or enactment should undertake to exercise the right of visitation over a national corporation. Except insofar as such corporation was liable to control in the courts of justice, this act was to be the full measure of visitorial power.

The validity of this interpretation was reiterated in *Kelly v. Harrisburg Nat. Bank*, 44 Dauphin Co. Rep. 174, 30 D. & C. 535 (1937), and in *National State Bank v. Long*, 630 F.2d 981 (3d Cir. 1980). In *Kelly v. Harrisburg Nat. Bank*, the state court held that the Pennsylvania Secretary of Revenue could not examine certain records of a national bank to determine the tax liability of its customers because the relation between the bank and its depositors is confidential and "the character of the examination demanded . . . would seem to constitute the exercise of visitorial power prohibited by Congress."

In *National State Bank v. Long*, the Third Circuit Court of Appeals reviewed the applicability of New Jersey's anti-redlining statute to national banks. While the court held that the nondiscrimination requirements were not preempted by federal law, it invalidated the enforcement, subpoena, and supervisory powers granted to the New Jersey Banking Commissioner as applied to national banks. The OCC, it said, possessed the exclusive authority to examine for compliance with the state law.

There have been instances when investigations through the use of subpoena power into the affairs of a national bank by government agencies other than the OCC have been upheld against a challenge brought under 12 U.S.C. 484. With one exception, however, these cases involved a federal government agency engaged in law enforcement activities authorized by Congress. *Bank of America Nat. Trust & Savings Ass'n v. Douglas*, 105 F.2d 100 (D.C. Cir. 1939); *Bowles v. Shawano Nat. Bank*, 151 F.2d 749 (7th Cir. 1945); and *Peoples Bank v. Williams*, 449 F. Supp. 254 (W.D. Va. 1978). The exception was *Minnesota v. First Nat. Bank of St. Paul*, 313 N.W.2d 390 (S.Ct. Minn. 1981), a state court decision supporting a state agency's proposed examination of national bank records, discussed in detail below.

Bank of America and *Peoples Bank* both addressed investigations by the Securities and Exchange Commission into alleged securities law fraud, and *Bowles* enforce a subpoena issued by the Price Administrator seeking records of four depositors at a national bank during World War II. In *Bowles* the court found that the subpoena for bank depositor records involved an exercise of visitorial powers authorized by law, by Congress, and by the court,

each of which was a basis for inquiry permitted by the terms of 12 U.S.C. 484. *Bank of America* and later *Peoples Bank* concluded not only that the SEC was engaged in permissible investigatory activities, but also that its request for records in the circumstances outlined did not constitute the exercise of visitorial powers. This was effectively dictum since in any event the SEC's investigation was one "authorized by law", which would satisfy the requirements of 12 U.S.C. 484.

Minnesota v. First Nat. Bank of St. Paul, the decision mentioned above which allowed the State Treasurer to review national bank records to determine the bank's compliance with the state's unclaimed property law, stands as an anomaly. The court concluded that the Treasurer's limited investigation was not an exercise of visitorial powers within the meaning of 12 U.S.C. 484 that Congress intended to preempt. In response to this 1981 decision, Congress the following year revised 12 U.S.C. 484 in two ways.

Until 1982 the statute had permitted the exercise of visitorial powers "as authorized by law". In 1982 Congress revised the statute to read "as authorized by Federal law", to clarify that only Congress, and not the states, could create exceptions to the OCC's exclusive visitorial powers with respect to national banks. Secondly, the Congress added 12 U.S.C. 484(b) as a new subsection, authorizing state officials in specified circumstances to review a bank's records if there was reasonable cause to believe that the bank had failed to comply with the state's unclaimed property or escheat laws. This action demonstrated that the Congress, contrary to the court in *Minnesota v. First Nat. Bank of St. Paul,* considered a review of

bank records, even for a narrow or specific law enforcement purpose, to amount to an exercise of visitorial powers.

In sum, we do not believe that the Bank is required to comply with the subpoenas in question. This attempted exercise of visitorial power by local officials is not "authorized by Federal law", conflicts with the express terms of 12 U.S.C. 484, as historically interpreted and particularly as amended in 1982, and is incompatible with the comprehensive scheme of federal supervision and examination of national banks administered by the OCC.

I trust that this reply is responsive to your inquiry.

Sincerely yours,

/s/ William P. Bowden
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